



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Rosalynn Hughey

SUBJECT: SEE BELOW

DATE: September 24, 2018

Approved

D. D. Syl

Date

9/24/18

COUNCIL DISTRICT: 8

SUPPLEMENTAL

SUBJECT: FILE NOS. PDC14-051 AND PD16-019. PLANNED DEVELOPMENT REZONING FROM THE A AGRICULTURAL ZONING DISTRICT TO THE PQP(PD) PLANNED DEVELOPMENT ZONING DISTRICT OF AN APPROXIMATELY 21.0-GROSS ACRE SITE TO ALLOW A MEDICAL CARE FACILITY WITH UP TO 248 BEDS ON AN APPROXIMATELY 3.0 ACRE PORTION OF THE SITE WITH THE REMAINING 18.0 ACRES TO BE RESERVED AS OPEN SPACE; A PLANNED DEVELOPMENT PERMIT TO ALLOW THE DEMOLITION OF APPROXIMATELY 25 BUILDINGS/STRUCTURES, THE CONSTRUCTION OF A MEDICAL CARE FACILITY WITH UP TO 248 BEDS, AND THE REMOVAL OF SEVEN ORDINANCE-SIZE TREES ON AN APPROXIMATELY 3.0-ACRE PORTION OF A 21.0-GROSS ACRE SITE, ON THE EAST SIDE OF DOVE HILL ROAD, APPROXIMATELY 500 FEET NORTH OF HASSLER PARKWAY (4200 DOVE HILL ROAD).

REASON FOR THE SUPPLEMENT

At the August 28, 2018 meeting, the City Council took action to continue the subject project so that additional community outreach could be conducted. Subsequently, on September 6, 2018, a community meeting was held at the Evergreen Community Center with approximately 70 members of the public in attendance. Staff from the Departments of Planning, Building and Code Enforcement (PBCE) and Public Works (PW) attended the meeting, as well as the applicant and Councilmember Sylvia Arenas and her staff. After the staff and applicant presentations, two members of the community provided a PowerPoint presentation after which there was an extensive question and answer session. This Supplemental Memorandum provides staff's responses to the items raised at the community meeting, emailed to staff, and comments from the public on the California Environmental Quality Act (CEQA) clearance documents for this project.

ANALYSIS

The following are staff responses to public comments regarding public noticing, neighborhood compatibility and the traffic study conducted for the project.

Public Noticing

Several residents inquired about the noticing and community meeting requirement for the circulation of the Initial Study/Mitigated Negative Declaration. Pursuant to the CEQA Guideline Section 15073, the draft IS/MND was circulated for a period of 20 days from April 9, 2018 to April 30, 2018, with the Notice of Intent published in a newspaper of general circulation and e-mail notification sent to interested parties requesting notification. Staff has been consistent with the required notifications and circulation protocols per the CEQA Guideline.

For the September 6, 2018, community meeting, staff increased the standard community meeting notice radius from 1,000 feet to 2,000 feet to ensure that more residents of The Ranch subdivision closest to the proposed development received notices. Additionally, staff distributed the meeting notice via email to interest parties who had previously provided email addresses. The District 8 Council office posted the community meeting on NextDoor and also hand-delivered notices to approximately 200 residents. Staff acknowledges a typographical error in the name of the location in the first mailed notice, in which the location was stated as "Evergreen Community College" instead of "Evergreen Community Center" and upon being alerted of the error, staff mailed out revised notices. Staff has been responsive to community members who have emailed their contact information to be added to mailing or email blasts. Additionally, staff met with community leaders on September 19, 2018, to further discuss their concerns and questions.

Neighborhood Compatibility

At the September 6, 2018, community meeting, residents expressed concerns that the project was out of character with the existing neighborhood, particularly regarding the height and design aesthetics. Additionally, staff received an email on September 13, 2018, from Robert Reese of the District 8 Community Roundtable requesting that staff consider and analyze several project components. Below is staff response to Mr. Reese's questions:

1. "How many residential independent living units will there be?"

Staff Response: The project is not proposing any independent living units. The medical care facility is for persons who require daily operational assistance and on-site medical care.

2. "How many units with kitchens will there be?"

Staff Response: The project does not propose individual kitchens. Meals are prepared by staff in facility kitchens and are served in common dining areas.

3. “The traffic study references parking for beds whose residents may drive. Please further explain how this comment relates to a medical care facility with non-ambulatory patients?”

Staff Response: The traffic report is referencing the City’s Municipal Code parking requirement. The traffic report analyzes the project’s traffic operation and pattern. The traffic report does not need to analyze parking since the project meets the City’s standard parking requirements and does not seek a parking reduction.

4. “How much of the 3 acre site was created as a result of illegal grading?”

Staff Response: There is no record of illegal grading on the subject site. The site has been at its current grade level since the time of the General Plan Amendment in 2010.

5. “The Commercial Design Guidelines were not utilized to analyze the compatibility of the project design to the neighborhood. The Commercial Design Guidelines are used in analyzing other senior medical care facility in San José by Planning Staff. The project was considered as commercial in your traffic allocation analysis.”

Staff Response: The intent of the Commercial Design Guidelines is to address issues of neighborhood compatibility, project function, and aesthetics for primarily commercial uses. The location of the project itself does not lend itself to a traditional commercial configuration; therefore, the application of the commercial design guidelines would be quite limited. In the staff report, staff did consider compatibility and design aspects through the General Plan Policies and Planned Development Permit analysis.

The key distinction of this medical care facility is that it is proposed on a graded hillside where there is a significant amount of open space land that would buffer the project site to the nearest residential development (approximately 500 feet away and 180 feet difference in elevation). The medical care facility is limited to three acres, utilizing a mix of landscaping and varying height to blend into the hillside. To complement the surrounding area, the buildings are proposed to be of a natural color palette (green, grey, tan) to better match the natural hillside color tones.

6. “The 20 foot grade differential between the smaller Building A and the larger Building B results in Building B being at least 78 from the lower grade. The height limit you reference being 70 feet.”

Staff Response: The City’s Municipal Code defines the height of a structure is measured from the top of the building to the average grade directly below the structure. Therefore, the commenters’ method of measuring height to the lowest grade on the parcel site would be inconsistent with the Municipal Code.

7. “Below are the Envision 2040 policies on compatibility which have not yet been considered in your analysis.”

- VN-1.10 Promote the preservation of positive character-defining elements in neighborhoods, such as architecture; design elements like setbacks, heights, number of stories, or attached/detached garages; landscape features; street design; etc.

- VN-1.11 Protect residential neighborhoods from the encroachment of incompatible activities or land uses which may have a negative impact on the residential living environment.
- VN-1.12 Design new public and private development to build upon the vital character and desirable qualities of existing neighborhoods
- CD-4.4 In non-growth areas, design new development and subdivisions to reflect the character of predominant existing development of the same type in the surrounding area through the regulation of lot size, street frontage, height, building scale, siting/setbacks, and building orientation.

Staff Response: The General Plan policy references are from the “Vibrant Neighborhoods” section and primarily address the compatibility of new development when adjacent to other buildings and structures. The proposed project is located at the bottom of the hill approximately 500 feet and 180 feet in elevation away from closest residential development. Given this substantial distance, the impacts of the project’s height and massing are minimized.

8. “Given the size, shape and location of the site can the construction process proceed without illegal parking and creating traffic Hassler Parkway? Have these impacts been analyzed in the Traffic Study?”

All construction that requires staging and preparation on public streets is required to coordinate with the Department of Public Works and Department of Transportation. The subject site solely takes access from Dove Road, where it is expected that vehicles associated with the construction of the project will utilize Dove Road and, possibly, Hassler Parkway, also a public street, for access. The traffic study generally does not include an analysis of daily construction activities, as the analysis is focused more on long-term traffic projections; construction periods are more short-term impacts.

Traffic Study

In 2008, the City certified an Environmental Impact Report (EIR) for the Evergreen East Hills Development Policy (EEHDP) which included a transportation policy. The EEHDP provides the CEQA traffic clearance for developments located within the defined Evergreen boundary. The proposed project was determined to be in conformance with the Policy; therefore, no further CEQA traffic review for transportation was required.

- The project did however submit a traffic operational analysis to address neighborhood issues. The following is a summary and response to recent public comments on traffic.
Access to US101/Hellyer,
- Roadway safety on Dove Hill:
 - Emergency vehicle access
 - Width of Dove Hill,
 - Curvature of Dove Road
- Roadway safety on Hassler Parkway
 - Intersection of Hassler Parkway at Dove Road

- Construction impacts
- Accuracy of the traffic operational analysis
 - 2015 data
 - Project description inaccurate
 - Land use traffic inconsistency
 - Number of employees

Due to the level of traffic concerns raised by residents at the September 6, 2018, community meeting, Department of Transportation (DOT) and PW staff further evaluated issues raised and have provided the following additional responses:

Access to Highway 101/Hellyer Avenue Ramps

The northbound ramps at Hellyer Avenue are currently controlled by ramp metering during peak hours. Dove Road provides direct access to the ramps at this location. As with all metered ramps, CALTRANS controls the rate of entry onto Highway 101, which is typically 800-900 vehicles per hour. It is the ramp operations that causes the backup on Dove Road during the AM peak hour. The project may add some vehicles during shift changes to the existing queue on Dove Road in the AM peak hour. However, for this land use, vehicle trips are projected to occur all day long with inbound AM traffic much more prevalent than the outbound commute traffic. The project will generate medical personnel, support staff for the facility, visitors, and food and laundry services, etc. which occur mainly throughout a typical day.

Roadway Safety on Dove Road

DPW/DOT staff evaluated the width and horizontal curvature of Dove Road. Although the overall right-of-way is a minimum 40 feet, the 30-foot curb to curb and allows for 13 foot travel lanes which is a standard width. In compared to today's Complete Street standard for 10 feet travel lanes, the existing streets would be considered wider than what the Complete Street standard recommends. Dove Road is designed as a 30 MPH roadway due to the existing curvature and the adjacent slope. Staff recommends installing edge lines to narrow the travel lanes and install other pavement markings intended to reinforce the speed limit.

Emergency Vehicle Access

For proposed development, emergency vehicle access is only evaluated for the onsite conditions proposed by the development. The existing roadways are not evaluated on a project by project basis because the City's street design standards account for emergency vehicle use. During the long range planning of land use and transportation, emergency vehicle access is addressed by determining the location of emergency facilities to support the anticipated growth in the General Plan. This also ensures that emergency facilities and public street access are sufficient and proximate to future land development.

Roadway Safety on Hassler Parkway

DPW/DOT staff evaluated the width and operations of Hassler Parkway. The 2015 operational analysis indicated that the posted speed limit is 35 MPH while the survey indicated the 85% percentile speed was approximately 41 MPH. City staff concur that existing speeds are greater than the posted speed limit. The existing roadway is approximately 50 feet wide with 40 feet curb-to-curb and 18-foot-wide travel lanes. DOT had previously installed white edge lines along Hassler Parkway which narrow the travel lanes to 12 feet and provided 8 feet shoulders and resulted in reduced speeds. Additional improvements that could be implemented would be electronic speed signs.

Hassler Parkway at Dove Road

This intersection was evaluated for additional traffic control. The 2015 report indicated the unsignalized Level of Service (LOS) for this intersection to be LOS "A" today and would degrade to LOS "B" with the project during the peak hour, which is an acceptable LOS operation. Staff recommends the addition of stop signs along Dove Road to address peak hour additional traffic from the project.

Construction Impacts

For all developments, the planning permit includes conditions on the times construction can occur. When the project obtains building permit and public improvement plans, it is required to have an onsite inspector, another inspector for the public improvements, and a traffic control plan. The grading plan also includes requirements for a construction entrance and dust control measures. In addition, the project is required to keep the streets clean.

Accuracy of the Traffic Operational Analysis

The 2015 traffic operational analysis submitted by Hexagon collected both speed and volume data along both Dove Road and Hassler Parkway. Because the Evergreen Development Policy limits the amount of development in the policy area, staff concluded since there were no development projects implemented within the proximity of the project during the last five to seven years, that there would not be significantly increase of current traffic levels. Therefore, the 2015 data is considered acceptable.

Accuracy of Project Description

During the entitlement process for the project, there were several land use proposals considered for the site. When the operational analysis was being prepared, assisted living facility or something similar was being proposed. The current proposal is a medical care facility which is similar to a convalescent home with memory care and is most consistent with the Institute of Transportation Engineers (ITE) classification of Nursing Home (Lane Use 620):

A nursing home is any facility whose primary function is to provide care for persons who are unable to care for themselves. Examples of such facilities include rest homes and chronic care

and convalescent homes. Skilled nurses and nursing aides are present 24 hours a day at these sites. Nursing homes are occupied by residents who do little or no driving; traffic is primarily generated by employees, visitors, and deliveries.

| Land Use | Size | Daily Rate | Daily Trips | AM Peak Hour | | | PM Peak Hour | | | | | |
|---------------------------|----------|------------|-------------|--------------|----|-----|--------------|-----------|----|-----|-----------|--|
| | | | | Trip Rate | In | Out | Total | Trip Rate | In | Out | Total | |
| Proposed Land Uses | | | | | | | | | | | | |
| Assisted Living - 254 | 248 beds | 2.6 | 645 | 0.19 | 30 | 17 | 47 | 0.26 | 25 | 40 | 64 | |
| Nursing Home - 620 | 248 beds | 3.06 | 759 | 0.17 | 30 | 12 | 42 | 0.22 | 18 | 37 | 55 | |

*Institute of Transportation Engineers, Trip Generation Manual, 10th Edition

Land Use Traffic Inconsistency

The 2015 operational analysis assumed a 290-bed assisted living facility. The above chart includes the current proposal for a 248-bed Medical Care Facility (Nursing Home) and the updated trip generation rates. The current proposal generates more traffic than the estimated assisted living facility; however, the 248 bed proposal is less than the initial 290 bed proposal. For either land use, the AM and PM peak hours vehicle trips are about the same.

Number of Employees

The estimated trip generation rates are derived from traffic data collected at multiple nursing homes. The total number of trips is divided by the total number of beds for all the surveyed sites, thus providing an average trip rate per bed. The data includes all employees, visitors, and delivery vehicles. Staff is confident that the estimated traffic is reflective of the proposed project.

Recommendations

DPW/DOT have concluded an evaluation of the existing field conditions and proposed project conditions, and would recommend the following items as additional conditions to address neighborhood concerns:

Dove Road:

- Install edge lines to narrow the travel lanes.
- Install other pavement markings intended to reinforce the speed limit.
- Install stop signs at the intersection of Dove Road and Hassler Parkway at both the north and south approach.

The above recommendations will provide improved speed control along Dove Road and improve intersection operations at the intersection of Dove Road and Hassler Parkway.

California Environmental Quality Act (CEQA) Comments

CEQA does not require formal responses to comments on an IS/MND, but does require lead agencies to consider comments received [CEQA Guidelines §15074(b)]. Therefore, the City responded to public comments received during the public circulation period, and these comments were posted to the City's Negative Declaration/Initial Studies website on the Dove Hill Medical Care Facility Project Negative Declaration/Initial Studies page at <http://sanjoseca.gov/index.aspx?NID=6068>, approximately 12 days prior to the July 25, 2018 Planning Commission. On the day of the August 28, 2018 City Council hearing, the City received additional public comments on the draft IS/MND; the City has also received additional comments since the hearing date. Although these comments were not received during the public circulation period, the City is responding to these comments as a courtesy to clarify the analysis in the IS/MND and address community concerns. Attached are responses to public comments received on and after the August 28, 2018 City Council hearing related to the IS/MND and CEQA requirements.

Public comments on the IS/MND primarily focused on the following issues: 1) incorrect CEQA noticing, 2) visual impacts to nearby residents, 3) air quality impacts to the future occupants, 4) noise impacts to future occupants, 5) loss of agricultural land, 6) increase in lighting, 7) geologic hazards and the potential for landslides resulting from project construction, 8) hazardous materials such as naturally occurring asbestos on site, 9) traffic, and 10) project impacts to sensitive habitat. Responses to these concerns are summarized below:

- 1. CEQA Noticing:** Pursuant to the CEQA Guideline Section 15073, the draft IS/MND was circulated for a period of 20 days from April 9, 2018 to April 30, 2018, with the Notice of Intent published in a newspaper of general circulation and e-mail notification sent to interested parties requesting notification.
- 2. Visual/Aesthetic:** The project would be visible from Hellyer County Park, located across Hwy 101 west of the site. However, the project would not be a significant impact to views from the Park because views of the site are partially blocked by the Highway 101 soundwall and Highway 101 itself, the development site is already developed with structures, and most of the hillside will remain undeveloped. In addition, there are no views of the project site from public streets above the project site to the east, as these streets are developed with single-family homes and fences or are located behind hills which block views of the site.
- 3. Air Quality Impact:** Although no longer considered an impact under CEQA, the IS/MND evaluated and identified the potential for risks to future occupants of the site from toxic air contaminants pursuant to General Plan policies, and identified conditions to reduce these risks.
- 4. Noise Impact:** In conformance with General Plan policies, the IS/MND evaluated the exposure of future site occupants to noise from US 101. Due to noise exposure, the project proposes a 14 to 16-foot tall noise barrier around the outdoor common area to comply with the City's General Plan policies.

5. **Loss of Agricultural Land:** According to the California Department of Conservation and the Santa Clara County Williamson Act Properties information map, the project site is not part of a Williamson Act nor is the site considered to be Prime Farmland, Unique Farmland, or Farmland of Statewide Importance. Furthermore, the project would only develop three acres of a larger 21-acre site that is currently developed with small structures.
6. **Lighting:** All project lighting is required to conform to the City's Outdoor Lighting on Private Development policy to reduce light exposure to adjacent properties.
7. **Geological/Landslides Impacts:** The City Geologist issued a Certificate of Geologic Hazard Clearance for the project and the proposed sanitary sewer alignment approved by the Department of Public Works. This clearance identified conditions for the construction of the project, to reduce landslide risks.
8. **Hazardous Materials/Naturally Occurring Asbestos:** As disclosed in the IS/MND, soil samples indicate the potential for naturally occurring asbestos on the site. However, the IS/MND identified mitigation measures which will be implemented during construction to reduce the potential impacts to a less-than-significant level.
9. **Traffic:** Traffic impacts for this project has been reviewed and considered to be consistent with the Evergreen East Hills Development Policy. Further discussion regarding traffic operations are available in the IS/MND and the Transportation Operational Assessment (Appendix I to the IS/MND).
10. **Biological Impacts:** The IS/MND and associated biological assessments analyzed and disclosed potential impacts to biological resources to the full 21-acre site. As explained in the IS/MND, the proposed development would occur within the development footprint of the existing structures and disturbed areas. Site surveys by a qualified biologist found limited patches of native-dominated serpentine habitat occur at the edge of the proposed development footprint. However, only approximately 100-200 square feet or less of this habitat occurs within the project's development footprint. Because this serpentine habitat is located at the edge of existing development, it provides relatively low-quality habitat for serpentine-associated special-status plants. Staff provided three separate responses regarding the sufficiency of the biological analysis in the Responses to Comments (<http://www.sanjoseca.gov/index.aspx?NID=6068>), the memorandum to City Council on August 28, 2018 (<https://sanjose.legistar.com/LegislationDetail.aspx?ID=3601592&GUID=02E32318-E90A-4589-A69A-6035517FCDCD&Options=&Search=>), and responses to comments provided prior to the September 25, 2018 hearing (see attached).

Based on the analysis disclosed in the IS/MND, associated technical reports (i.e., biological assessment, transportation operation analysis, geotechnical investigation, and environmental site assessment), and responses to comments, the Dove Hill Road Medical Care Facility project will not have a significant effect on the environment in that the IS/MND identifies one or more potentially significant effects on the environment for which the project applicant, before public release of this draft Mitigated Negative Declaration, has made or agrees to make project

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revisions that clearly mitigate the effects to a less than significant level, as defined in CEQA Guidelines §15369.5. Furthermore, the comments raised by the community did not provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND [CEQA Guidelines §15074(b)] and therefore, no further analysis is required. Attachment below provides additional detailed responses to CEQA comments from community stakeholders.

/s/
ROSALYNN HUGHEY, DIRECTOR
Planning, Building and Code Enforcement

For questions please contact Sylvia Do, Interim Deputy Director, at (408) 535-7907.

Attachments:
Additional CEQA response

ADDITIONAL CEQA RESPONSES TO PUBLIC COMMENTS RECEIVED ON AUGUST 28, 2018 & ON

Summary of Comments and Background

An Initial Study (IS) and Mitigated Negative Declaration (MND) were prepared by the Planning, Building and Code Enforcement for the Planned Development Rezoning and Planned Development Permit for Dove Hill Medical Care Facility project. The documents were circulated for public comments between April 9, 2018 to April 30, 2018. The entire IS/MND, Responses to Comments, and other related environmental documents are available on the Planning web site at: <http://sanjoseca.gov/index.aspx?NID=6068>.

Additional public comments were provided at the City Council meeting of August 28, 2018 for the Dove Hill Medical Care Facility project. In addition, comments and presentations were also submitted during the community meeting on September 6, 2018. Since then, public comments have been submitted via email to staff to provide as part of the public record. Formally written comments were received on August 28, 2018 and since then, comment letters by several residents of the Silver Creek Ranch neighborhood and law firm representing the residents between September 6 and September 17, 2018 with environmental concerns.¹ Per the request of a few community representative, an additional meeting between Planning and Public Works staff and two community representative took place at 5:00 PM on September 19, 2018 and previous environmental concerns were also reiterated.

California Environmental Quality Act (CEQA) does not require formal responses to comments on an IS/MND, only that the lead agency consider the comments received [CEQA Guidelines §15074(b)]. Nevertheless, responses to the comments are included in this document to provide a complete environmental record. Below are responses to public comments and concerns pertaining to the CEQA legal procedures, requirements, protocols, resource sections on and since the **City Council Hearing on August 28, 2018**.

Comments and Responses to Lozeau Drury LLP (submitted August 28, 2018)

The law firm of Lozeau Drury LLP, representing Laborers International Union of North America, Local Union 270 (LIUNA), provided a comment letter during the 20-day public review of the Initial Study/Mitigated Negative Declaration on April 30, 2018. Staff posted a formal response to comment to these environmental concerns on July 12, 2018 and notified all commenters of the posting.

On June 25, 2018, the commenter attended the Planning Commission meeting and provided a seven-page additional comment letter with concerns about staff's previous responses to comments. Staff provided a summary response to all the public comments regarding environmental impacts at that Planning Commission meeting. Planning Commission recommended project be approved by the City Council. As part of the Planning Commission's memorandum to the City Council dated

¹ For clarity and comprehensiveness, responses to the community's comments are organized by theme and only include items regarding environmental or CEQA concerns.

August 28, 2018, staff included responses to the document submitted by the commenter at the June 25th Planning Commission meeting in order to provide a complete public record.

Planning then received another response letter at approximately 1 PM on Tuesday August 28, 2018, from attorney Michael Lozeau, representing Laborers' International Union of North America, Local Union 270 regarding the proposed Dove Hill Medical Care Facility project. The letter further reiterated the commenter's concerns with regards to biological impacts to the full 21-acre project site.

Below are additional responses to the comment letter submitted by Michael Lozeau, representing Lozeau Drury LLP, on the City Council Hearing date of August 28, 2018.

Comment A1: Please accept these additional supplemental comments on behalf of the Laborers International Union of North America, Local Union 270 and its members living in and around the City of San Jose ("LIUNA") regarding the Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the Dove Hill Medical Care Project ("Project") (Project Files Nos. PDC14-051 and PD16-019). These comments supplement previous comments dated April 30, 2018 and July 25, 2018 submitted on behalf of LIUNA. LIUNA has retained the services of expert wildlife biologist Dr. Shawn Smallwood to review the biological review contained in the Project's IS/MND as well as several responses prepared by the City's staff to prior comments submitted by Dr. Smallwood.

Response A1: The comment above is introductory and provides a description of the timeline of comments and response. Therefore, no direct response is required to the comment.

Comment A2: Dr. Smallwood has prepared the attached additional comments for the Council's and staff's review. Based on a recent visit he made to the site, Dr. Smallwood has confirmed that numerous ground squirrel burrows are located immediately adjacent to the Project site. Such burrows are commonly used by burrowing owls and indicate there is a likelihood that burrowing owls may be present at or adjacent to the Project site, especially during their nesting season. Likewise, the burrows observed by Dr. Smallwood are the type of burrows utilized by California tiger salamanders as upland habitat and are accessible to tiger salamanders documented near the site. He also observed several other sensitive bird species including Cooper's hawk, red-tailed hawk, and Common yellowthroat foraging and flying at or adjacent to the Project site.

Response A2: The one picture taken that identified ground squirrel burrows fails to indicate whether the squirrel burrows are within the 3-acre development footprint of the site or within the 18-acres that would be preserved as open space. The proposed project will be constructed primarily on land that is already developed and covered with pavement sections and structures, as well as stored vehicles and materials. Thus, as stated in the IS/MND, if the burrowing owl occurs on the project site, it would not be present within the development footprint of this project. Furthermore, the presence of ground squirrel burrows is no guarantee that burrowing owls are present. Nevertheless, it is possible that burrowing owls could use the grassland within the hillside open space for foraging, roosting, and possibly

nesting. In conformance with the Santa Clara Valley Habitat Conservation Plan (VHP), the Project proponent will pay all required impact fees in accordance with the types and acreage of habitat or "land cover" impacted by the project, and would implement the required conservation measures specified by the VHP for covered species, including the burrowing owl. This requirement is part of the project permit as a condition and would be implemented prior to the issuance of any grading permits. In addition, as stated in the IS/MND, mitigation measure BIO-1.1 would include a Monitoring and Management Plan to preserve the any serpentine habitat and special-status plant species in the 18-acres to be left as open space. This measure includes, but is not limited to, fencing to prevent unauthorized human access, management activities to address potential unauthorized use, periodic monitoring of the site, and similar maintenance protocols. This plan will be completed prior to the issuance of any grading permit. This measure is part of the permit and the Mitigation Monitoring and Reporting Program (MMRP).

Refer to Response A4 for observed bird species around the site and Response A5 for salamander discussion.

Comment A3: Despite Dr. Smallwood's evidence of the likely presence of burrowing owls immediately adjacent to the site, no burrowing surveys were conducted during the owl's nesting season in order to determine whether or not the owls are actually present at the site. As a result, the IS/MND fails to address the possible impacts the Project's construction and operation may have on nearby burrowing owls and/or their habitat.

Response A3: As discussed in detail in H. T. Harvey & Associates' response to comments letter dated May 22, 2018, the IS/MND, and associated Biotic Assessment of the IS/MND (Appendix B to the IS/MND), the burrowing owl is a covered species under the VHP, and the proposed project is a covered activity under the VHP. The IS/MND for this project adequately explains how this project is required, through City approvals and the VHP, to implement site specific mitigation measures for habitat and species protection. The Santa Clara Valley Habitat Agency, a joint powers agency of which the City of San Jose is a partner, obtained federal and state incidental take permits with a term of approximately 50 years for itself and its partners, and has an existing program and mechanism for mitigation of covered species impacts as well as a program by which mitigation measures can be funded on a fair-share basis through the collection of fees from public and private project developers. The VHP explains in detail how the fees for mitigation of burrowing owl impacts will be used by that Agency, meeting the requirements of CEQA Guidelines section 15130(c) that cumulative conditions may be dealt with via programs or ordinances requiring the contribution of fair-share fees. *Save Our Peninsula Committee v Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502.

In the VHP this site is not mapped as a potential occupied nesting habitat for burrowing owls and no further surveys are required under the requirements of VHP. Nonetheless, as part of

this project, H.T. Harvey & Associates has conducted multiple reconnaissance-level site surveys (completed in September 12, 2008, September 15, 2008, February 9, 2009, and March 31, 2015) and literature research to establish potential existing habitats for potential species to exist, burrowing owls included, in the full 21-acre project site. Because these reconnaissance surveys found no potentially suitable burrowing owl habitat on the project site, no further surveys are required. Based on the biological report completed as part of the IS/MND, which also includes reviewing information of approved plans such as the VHP, literature research of past occurrence on the site, past surveys, and reconnaissance-level site surveys, there is a low probability of occurrence of the burrowing owl on the site due to the lack of California ground squirrel burrows observed during reconnaissance-level field surveys.

Comment A4: Likewise, the IS/MND makes no mention of the potential impacts the Project may have to foraging and other habitat of the sensitive bird species identified by Dr. Smallwood at or adjacent to the Project site, including Cooper's hawk, red-tailed hawk and Common yellowthroat. The IS/MND for the Project does not address potential impacts Cooper's hawk, red-tailed hawk, or San Francisco common yellowthroat. The Cooper's hawk, red-tailed hawk and San Francisco common yellowthroat are not covered by the Santa Clara Valley Habitat Plan ("VHP"). The Cooper's hawk and red-tailed hawk are not addressed at all in either the VHP EIR or 2040 General Plan EIR. Accordingly, no CEQA review of the Project's impacts to these three species has been done.

Response A4: Many of the birds observed during the biologist's two hours visits to the project vicinity were marked as observed on site. However, many of the pictures, with the exception of mourning doves, were captioned with observed "around" or "near" the project site. It is also unclear as to whether the species that are observed are within the development footprint of the site or within the 18-acre area that would be preserved as open space. The IS/MND, biological surveys, and responses to commenters disclosed that the construction of the project would result in a potential loss of fertile eggs of nesting raptors or other migratory birds or nest abandonment. Hence, as part of the project, mitigation measure BIO-2.1, which is consistent with federal law, would require pre-construction nesting bird surveys prior to demolition, grading, or construction activities (whichever occur first). In addition, mitigation measure BIO-3.1 also requires a Monitoring and Management Plan to preserve the serpentine habitat and special status plant species present in the 18-acre open space above the 3-acre development area. This includes, but is not limited to, periodic monitoring of the site, and preparation of a management plan to address unauthorized human uses.

Comment A5: Additionally, Dr. Smallwood observed the pathways that remain between a known salamander location and the Project site and noted the likelihood that salamanders would be moving through the site to access the numerous ground squirrel burrows on the adjacent hillside. Again, no surveys were conducted by the Project capable of determining whether salamanders already are present in those burrows at certain times of the year.

Response A5: As stated in the IS/MND, biological reports, and associated responses to comments, for California red-legged frogs or California tiger salamanders to be present on the site, potential breeding habitat must occur within the known dispersal distance for this species (2.0 miles for the California red-legged frog^{2,3} and 1.3 miles for the California tiger salamander⁴), and there must be no barriers to dispersal between the breeding site and the project site. As stated in the Biotic Assessment to the IS/MND, no waterbodies providing suitable breeding habitat for either species are present on or immediately adjacent to the Project site.⁵ The commenter also did not specify the specific location of where the detected salamander is from the site (i.e., north, west, south, east), which could determine if other barriers exist between the salamander location and the suitable breeding habitat area. For example, if south or west of the site, there are roadways and even freeways that could act as immediate barriers between the sites.

Comment A6: As discussed below and in Dr. Smallwood's supplemental comments, staff's reliance on conclusory statements by the Project's consultants and components of a habitat conservation plan applicable to statutes other than the California Environmental Quality Act ("CEQA") do not rebut Dr. Smallwood's substantial evidence of a fair argument that the Project may have significant impacts on a number of special status bird species and California salamanders at or adjacent to the site.

Response A6: Comments received on the IS/MND, responses to comments, and public hearing memoranda do not raise any new issues about the project's environmental impacts, or provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND [CEQA Guidelines §15074(b)]. Furthermore, the IS/MND and subsequent response to comments received on the IS/MND identified or reiterated project-specific mitigation measures, City standard conditions and conditions of approval that will reduce those impacts to a less than significant level. Because those mitigation measures, standard permit conditions, and conditions of approval would reduce the impacts to less than significant levels, no further mitigation measures or an environmental impact report are required.

Comment A7: A. Staff's Rebuttal Misstates the Standard Applicable to Determining When an EIR is Required. Attempting to rebut Dr. Smallwood, staff applies an incorrect standard for determining when a project's impacts may be significant. Staff asserts that CEQA Guidelines section 15065 provides that "a project's effects on biotic resources are deemed significant where the project **would** (1) substantially reduce the habitat of a fish or wildlife species, (2) cause a fish or wildlife

² Bulger, J.B. and N.J. Scott, Jr. 2003. Terrestrial activity and conservation of adult California red-legged frogs *Rana aurora draytonii* in coastal forests and grasslands. *Biological Conservation* 110:85-95.

³ [USFWS] U.S. Fish and Wildlife Service. 2010. Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for California Red-legged Frog; Final Rule. *Federal Register* 75:12815-12959.

⁴ Orloff, S. 2007. Migratory movements of California tiger salamanders in upland habitat-a five-year study. Pittsburg, California. Prepared for Bailey Estates, LCC by Ibis Environmental, Inc.

⁵ H. T. Harvey & Associates. 2015. Biotic Assessment (2015 Update), Dove Hill Road Assisted Living Project, San Jose, California.

population to drop below self-sustaining levels, (3) threaten to eliminate a plant or animal community, or (4) reduce the number or restrict the range of a rare or endangered plant or animal.” Appendix E, p. 2 (emphasis added). However, Guidelines section 15065 is clear that when a project *may* have such impacts, the agency must make a mandatory finding of significance and prepare an EIR.

Where an agency fails to properly investigate an impact, the scope of a fair argument becomes broader. “[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts. ‘If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.’” *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311. *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544.

Response A7: Pursuant to CEQA Guidelines section 15081, the preparation of an EIR is required if a project may have such impacts as mentioned by the commenter. However, Pursuant to CEQA Guidelines section 15065(b), a lead agency need not prepare an EIR, “solely because, without mitigation, the environmental effects at issue would have been significant.” As stated in the IS/MND and supporting documents, the City investigated the project site thoroughly on many occasions including subsequent biological reports. These efforts, the responses to previous commenter’s comments, the Mitigation Monitoring and Reporting Program (MMRP), and the conditions of the proposed Planned Development permit indicate that the project has incorporated mitigation measures and conditions to reduce potential effects to biological resources to a less than significant level. In addition, the comments received did not provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND [CEQA Guidelines §15074(b)].

Comment A8: Dr. Smallwood has provided his expert opinion based on his observations at the site and his extensive knowledge of the habitat needs and behavior of burrowing owls and other bird species and the California salamander, that the Project may have significant direct and cumulative impacts on those species. The biological assessment relied upon by the IS/MND claims “[t]here is a low probability of occurrence of the burrowing owl, a California species of special concern, on the site due to the paucity of California ground squirrel burrows.” Dr. Smallwood’s observations directly refute that there is a “paucity” of ground squirrel burrows directly adjacent to the Project site. Smallwood Aug. 26, 2018 Comments. As a matter of law, “substantial evidence includes . . . expert opinion.” (Pub. Resources Code, § 21080(e)(1); CEQA Guidelines, § 15064(f)(5).) CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. (CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1).

Response A8: Refer to Response 2 and 3 regarding responses to evidence that there are ground squirrel burrows on the site.

Comment A9: B. The Santa Clara Valley Habitat Plan Does Not Relieve The City of Performing Biological Surveys Designed to Actually Detect Burrowing Owls and Other Sensitive Species and Ensuring Adequate Mitigation of Impacts Under CEQA. Staff relies on the VHP as justifying staff's reliance on imprecise, reconnaissance level surveys. Staff essentially argues that the VHP serves as a stand-in for a thorough investigation of the site and surrounding hillside for the presence of burrowing owls and other species and serves to mitigate any potential biological impacts from the Project. This notion is incorrect as a matter of fact and law.

The only regulatory requirements the VHP assists in streamlining is the need for individual project's to obtain incidental take permits under the federal and state endangered species acts. Nothing in the VHP relieves the City from any requirement or duty to investigate a project site under CEQA. As the California Supreme Court has held:

To the extent the agency is arguing that a technique used for planning under another statutory scheme necessarily satisfies CEQA's requirements for analysis of a project's impacts, we disagree. Except where CEQA or the CEQA Guidelines tie CEQA analysis to planning done for a different purpose (see, e.g., § 21081.2, subd. (a) [CEQA findings on traffic impacts not required for certain residential infill projects that are in compliance with other municipal plans and ordinances]), an EIR must be judged on its fulfillment of CEQA's mandates, not those of other statutes.

Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth. (2013) 57 Cal.4th 439, 462. A habitat conservation plan itself does not satisfy CEQA. *Envtl. Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1027.

Response A9: This comment relates to the status and effectiveness of the VHP along with the use of the plan.

As stated in previous responses to similar comments from the commenters, the VHP was developed in association with the U.S. Fish and Wildlife Service (USFWS), and the California Department of Fish and Wildlife (CDFW), and in consultation with stakeholder groups and the general public. Permits issued by the USFWS and CDFW (jointly the Wildlife Agencies) would authorize incidental take of 18 plant and animal species included in the VHP. Rather than separately permitting and mitigating individual projects, the VHP evaluated natural-resource impacts and mitigation requirements comprehensively in a way that is more efficient and effective for at-risk species and their essential habitats. In addition, the City included policies and contemplated the adoption of the VHP in the 2040 General Plan. About two years later, the City approved the Final Joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the VHP on January 29, 2013 (Resolution No. 76546) and adopted the VHP in Chapter 18.40 of the San Jose Municipal Code requiring conformity with the VHP for project applications involving activities covered by the Plan.

The VHP has identified conservation strategies and mapped potential habitats of certain species. The City, through its partnership in the adoption of Santa Clara Valley Habitat Plan (VHP) in 2013, is a co-permittee for federal and state incidental take permits and applies the VHP conditions to projects that do not opt to obtain their own clearance from those wildlife agencies. Conformance to the VHP is also part of the General Plan policies.

The USFWS and CDFW have reviewed and approved the assessment of impacts of VHP-covered projects on burrowing owls contained in the EIR/EIS prepared for the VHP. Furthermore, the USFWS and CDFW have reviewed and approved the mitigation requirements for VHP-covered projects on burrowing owls. The proposed project will adhere to the requirements set forth in the VHP. It is not incumbent on the project proponent to determine the success/failure of the VHP's efforts to conserve burrowing owls.

As stated in the IS/MND Section 4.4.1.2 and Appendix B to the Initial Study/Mitigated Negative Declaration, information concerning the known distribution of threatened, endangered, or other special-status species and sensitive habitat that may occur in this area was reviewed, including the Valley Habitat Conservation Plan, were utilized and examined to determine potential species to occur on the project site. In addition, reconnaissance-level field surveys were conducted in September 12, 2008 and September 15, 2008. A follow up survey was conducted on February 9, 2009. Afterwards, a more focused reconnaissance-level site survey was completed for adult Bay Checkerspot butterflies on March 31, 2015. Therefore, the analysis stated in the IS/MND regarding potential impacts to biological resources was not solely based upon the VHP.

Comment A10: The EIR prepared for the VHP acknowledges that the VHP is not a stand-in for project-level CEQA review. As the FEIR for the VHP states, “[a]s part of the standard approval process, most projects would require separate, project-level environmental review under CEQA.” VHP FEIR, p. 2-7 (<https://scv-habitatagency.org/DocumentCenter/View/139/Final-Environmental-Impact-Report-Environmental-Impact-Statement-Volume-I>). *See also* id. (Response to Comment 50-66) (“The commenter is correct that project-level CEQA review will still be necessary with the adoption of the Habitat Plan”). The EIR prepared for the VHP only addresses the impacts that implementing the VHP itself would have on the environment. That EIR does not address the direct and cumulative impacts of individual projects. Although the VHP can and should be considered in the context of the Project’s environmental review, it cannot be used to alter the City’s duty to investigate the Project’s potential environmental impacts. By not looking for burrowing owls during the nesting season, the City cannot claim potential impacts to the owl have been evaluated or whether the VHP alone will be sufficient to mitigate potential impacts.

Response A10: Refer to Response 9 above.

Comment A11: For the foregoing reasons, as well as the reasons articulated in our previous comments and those of Dr. Smallwood, the IS/MND for the Project should be withdrawn, an EIR

should be prepared, and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Response A11: Refer to Response 6.

Attachment to Lozeau Drury LLP Letter

Comment A12:

Dear Ms. Le,

I write to reply to responses on my comments and previous replies on the biological resources assessment (H. T. Harvey & Associates) prepared for the mitigated negative declaration of the Dove Hill Road Assisted Living Project (City of San Jose 2018). My qualifications were summarized in my comment letter.

I visited the proposed project site on 25 August 2018, totaling about 2 hours on the site periphery and around the site. I viewed the site from Dove Road and from Hellyer County Park, and I drove along Thornberry Lane and looked over the remaining patches of open space between housing tracts north of Thornberry Lane. Ground squirrels have obviously long resided on site, as burrow complexes were evident (Figure 1). The burrows on the lower reach of the slope, east of the existing homes, are typical of burrows occupied by burrowing owls that I study in eastern Alameda County. Vegetation cover on other portions of the project site provides structure that is ideal for many species of birds (Figure 2).

By no means was I on site long enough to provide evidence of species absences. But I did verify the presence of a few species I anticipated could be there (Table 1). Of these species, Common yellowthroat is listed by California Department of Fish and Wildlife as a species of special concern and Cooper's hawk (Figure 3) is on the Taxa to Watch List. Red-tailed hawk (Figure 4) and turkey vulture (Figure 5) are protected by California Department of Fish and Game Code 3503.5. The presence of California ground squirrels on the site indicates potential for burrowing owls to breed on site or find refuge during the non-breeding season.

I detected and identified 23 species of bird in little more than two hours (Table 1), which is more than usual in my experience. Had I visited on different dates and different times of day, the species list would grow considerably, and would include more special-status species. Some of the species I detected appear in Figures 6 through 10).

Response A12: Refer to Response A4.

Comment A13: Response E.1: Landscaped habitat

Respondents argue that "...landscaped areas around the new facility would provide foraging habitat similar in value to the landscaped habitats currently on the site." "Landscaped habitat" is not a term used in wildlife ecology or conservation biology; there is no scientific foundation for the term. Habitat is defined by a species' use of the environment (Hall et al. 1997, Morrison et al. 1998), which

means that “landscaped habitat” makes no sense. Most special-status species typically cannot use environments that are “landscaped” for the human aesthetic.

Response A13: The correction from landscaped habitat terminology does not change the responses provided previously in Response E.1 of the memorandum to City Council for the Dove Hill Medical Care Facility project on August 28, 2018. This comment does not result in information that would change the analysis in the IS/MND. Therefore, this comment is Commenter’s correction is acknowledged and no further response is required.

Comment A14: Response E.2: Significance of impacts and mitigation

My brief site visit revealed that several special-status species do, indeed, occur in the project area. The project would reduce habitat of Cooper’s hawk, red-tailed hawk, both species of which I saw foraging on the project site. It would likely also reduce habitat of common yellowthroat, which I saw right next to the project site. Detection surveys would likely reveal additional special-status species, but preconstruction surveys would likely not. I stand by my earlier comments.

Response 14: Refer to Response A4.

Comment A15: Responses E.2 to E.4 and E.6, E.10, E.13, E.14

I have nothing further to add to my earlier comments on the issues addressed in these responses.

Response A15: No further responses to add to the earlier responses to these comments.

Comment A16: Response E.5: Burrowing owl habitat

Respondents claim there is a paucity of ground squirrel burrows at the proposed project site, and thus no potential for burrowing owl presence. That is not what I saw. Ground squirrel burrows are visible in Figure 1. Figure 11 shows a cropped portion of Figure 1, in which I count at least 15 ground squirrel burrows. Other ground squirrel burrows I observed up close at the project’s boundary (Figure 12). The burrows in both Figures 11 and 12 are located just outside the project’s footprint, but would be fully exposed to lights, noise and frequent human activity. Whatever likelihood might exist for burrowing owls to use these burrows presently would evaporate with the construction of a building and landscaping right in front of, and facing directly into, this slope.

Response A16: Refer to Response A2.

Comment A17: Response E.7: Lack of habitat for California tiger salamander

As I commented in my original letter, California tiger salamander was detected this year only 1,200 m from the proposed project site. I looked over the area where the tiger salamander was detected, and I examined the space between that site and the proposed project site for barriers to movement. No doubt the salamander’s upland habitat has been severely fragmented by residential development, but pathways remain for tiger salamanders to travel between their breeding pond and the ground squirrel burrows on the proposed project site. Another concern is that with the detection of California tiger

salamanders 1,200 m from the project site, there might be additional nearby sites where the species continues to breed.

Response A17: Refer to Response A5.

Comment A18: Response E.9 : Site is already developed

I looked over the current conditions at the site, and noted the nursery and homes. However, the structures at the site are small, the traffic volume is low, and there is little in the way of noise, lighting, and human activity. The proposed project would impose a larger structure with more traffic, noise and lighting.

Response A18: The commenter pointed out that the structures currently on site are small and the new project would increase in traffic, noise and lighting. The IS/MND has acknowledged and analyzed for traffic, noise and lighting. Section 4.1, 4.12, and 4.15 of the IS/MND has disclosed potential impacts from the proposed project on the existing environment pertaining to aesthetics (which includes lighting), traffic, and noise and had determined the impacts to either be less than significant or less than significant with mitigation measures under CEQA.

Comment A19: Response E.11: The project would not impede wildlife movement

In my experience, volant wildlife fly over portions of landscapes that are less disturbed by human structures and activities. For example, the golden eagles that my colleagues and I have tracked using GPS transmitters fly in patterns that mostly thread the needle between areas intensively used by people, meandering their paths to avoid lands covered by residential, commercial and industrial uses. While at the proposed project site, I noticed multiple species flying over the project site, likely for the same reason I just gave – because it remains one of the last remaining patches of relatively low human use in the region. Over the site I observed turkey vultures, red-tailed hawks, a Cooper’s hawk, a pair of northern shovelers, and mourning doves.

Response A19: The commenter made observations as to fly patterns of different species. As discussed in Attachment A – Bio Response Memo to the July 2018 RTC document, the site is disturbed and developed. It does not contain aquatic habitat. It is not identified as an established native resident or migratory wildlife corridor in the Coyote Valley Landscape Linkage report or VHP. Furthermore, the posted RTC and associated Bio Response Memo to that RTC details reasons why this site is not important for regional wildlife movements (Response D22 and D24 of the RTC and pages 5-6 of the Bio Response Memo).

Comment A20: Response E.12: The speed limit of 15 MPH will prevent traffic-caused wildlife mortality Nobody that I saw on Hassler Parkway drove as slow as 15 MPH. In fact, I saw cars being driven quite fast.

Response A20: This is an existing road with an existing established speed limit. The response from staff in E.12 in Attachment E posted on the City Council agenda for August 28, 2018 evening hearing mentioned the 15 mile per hour limit as a further distinction

between the Vasco Road and the Dove Hill Road and Hassler Parkway. This comment does not result in information that would change the analysis in the IS/MND. Therefore, this comment is Commenter's observation and no further response is required.

Comments from The Ranch Residents and Representatives (Submitted on September 6, 2018 through September 17, 2018)

Many of these concerns were highlighted during the presentations and testimonies at the August 28, 2018 City Council meeting, community meeting in September 6, 2018, and submitted to City staff via email after the community meeting. In addition, comments from other commenters (Lozeau Drury LLP) were reiterated without providing new evidence of impacts (Refer to Presentation submitted via email on September 14, 2018). Many of these concerns reiterated throughout the comments submitted.

Below is a summary of comments made in communications from residents of The Ranch submitted to City staff after the August 28, 2018 City Council Meeting:

Notice of Intent: Several comments expressed concern about insufficient notice of the public review of the Draft Initial Study and Notice of Intent (NOI) to adopt the Mitigated Negative Declaration (MND). Concerns included insufficient time for circulation, lack of mailed notices to nearby residents, and incorrect formatting of the NOI.

Response: Pursuant to CEQA Guideline Section 15073, a lead agency shall provide a public review period of no less than 20 days. The City circulated the Draft Initial Study for 20 days from April 9, 2018 to April 30, 2018, and therefore meets this requirement. A 30-day public circulation is required for projects that require review by the California State Clearinghouse (SCH) because they either require review by state agencies or the project is considered to be a project of Statewide, Regional, or Areawide Significance. Section 15206(2) of the CEQA Guidelines defines a project of Statewide, Regional, or Areawide Significance as:

“A project with the potential for causing significant effects on the environment extending beyond the city or county in which the project would be located. Projects subject to this subsection include:

- (A) A proposed residential development of more than 500 dwelling units;
- (B) A proposed shopping center or business establishment employing more than 1,000 persons or encompassing more than 500,000 square feet of floor space;
- (C) A proposed commercial office building employing more than 1,000 persons or encompassing more than 250,000 square feet of floor space;
- (D) A proposed hotel/motel development of more than 500 rooms; or
- (E) A proposed industrial, manufacturing, or processing plant, or industrial park planned to house more than 1,000 persons, occupying more than 40 acres of land, or encompassing more than 650,000 square feet of floor area.

The proposed Dove Hill Medical Facility project does not require review or approval from State Agencies and is not a project of Statewide, Regional, or Areawide Significance

because, of the criteria shown above that apply to the project, the project is less than the equivalent of 500 dwelling units and will not employ more than 1,000 persons.

CEQA Guidelines Section 15072(b) states that the NOI must be provided to organizations or individuals who previously requested notice and at least one of the following procedures: 1) publication in a newspaper of general circulation in the area affected by the proposed project, or 2) posting of the NOI on and off the project site, or 3) a direct mailing to owners and occupants contiguous to the project site. The NOI for the proposed project met this requirement because it was published in the Post Record on April 9, 2018 and notices were sent to individuals and organizations who previously requested notice. In addition to these requirements, the City posted the project CEQA documents on the City's website and sent a Newsflash for subscribers to the City of San Jose's Planning notifications. The NOI format and noticing process has been satisfied pursuant to the CEQA Guidelines Section 15072. No details of any future public hearings on the project were provided in the NOI because the dates of those hearings were not known at the time of public circulation.

Staff received four comments from organizations and individuals during the public circulation period. Staff responded to all comments during public circulation and posted these on the City's website at: <http://www.sanjoseca.gov/index.aspx?NID=6068>.

Visual Impacts: At the first City Council meeting on August 28, 2018 and in subsequent comments from residents of the Ranch at Silver Creek, community members have expressed concerns about the project's visual impacts from Hellyer Park and private views from adjacent properties in The Ranch.

Response: As stated in Section 4.1.1.2 of the Initial Study, the project is not located within a State or City designated scenic corridor. In addition, no natural scenic resources, such as rock outcroppings, are present on the site or in the project area. The area of the proposed development is already disturbed and has been developed for approximately 70 years with a residence, vehicle parking, and accessory structures. As stated in the Initial Study, the project would redevelop approximately three acres of the larger 21-acresite, with the remaining 18 acres remaining open space. As stated in Section 4.8.1.2 of the IS/MND, the project site was historically an undeveloped hillside until it was developed with orchards in 1938. Most of the orchard trees were removed by the mid-1950's, and by 1956 through the 1960's the southern portion of the site was used as a gravel quarry. The site was developed with the existing two-story primary residential structure between 1939 and 1948. The existing one-story secondary residential structure was constructed between 1953 and 1961. Quarry activities that began in the 1950's were discontinued by 1974.

The project would be visible from Hellyer County Park, located across Hwy 101 west of the site. However the project would not be a significant impact to views from the Park because views of the site are partially blocked by the Hwy 101 soundwall and Hwy 101 itself, the development site is already developed with structures, and 18 acres of hillside within the 21 acres of the total project site will remain undeveloped.

There are no views of the project site from public streets above the project site to the east, as these streets are developed with single-family homes and fences or are located behind hills which block views of the site. The City does not have policies to protect private views from single-family homes. Although the project will change private views, these views are of an already disturbed area developed with a residence and multiple accessory structures and Hwy 101 beyond. Furthermore, as found in *Mira Mar Mobile Community v. City of Oceanside* (2004, 119 Cal. App. 4th 492), under California law there is no cause of action for interference with access to light, air and view by an otherwise lawful structure (*Wolford v. Thomas* (1987) 190 Cal. App. 3d 347, 358).

Air Quality and Noise Impacts to Future Residents of the Project: The community has also voiced their concerns regarding the potential air quality and noise effects to the future occupants of the project.

Response: As noted in the IS/MND, for the purposes of determining an environmental impact under CEQA, the effect of existing environmental conditions on future occupants of the site is not considered an environmental impact except in limited circumstances. This is based on the 2015 California Supreme Court opinion in *California Building Industry Association vs. Bay Area Air Quality Management District (CBIA vs. BAAQMD)* holding that CEQA is primarily concerned with the impacts of a project on the environment and generally does not require agencies to analyze the impact of existing conditions on a project's future users or residents unless the project would exacerbate those environmental hazards or risks that already exist. However, the City has General Plan policies to minimize exposure of people to air pollution and toxic air contaminants which must be evaluated during City review of the development application. The IS/MND and supporting air quality assessment (Appendix A of the IS/MND) disclosed a potential risk to future occupants (indoor and outdoor) due to the location of the site next to a major highway. While the future occupants would use the outdoor recreational space, the occupants would not likely spend a majority of the day outdoors. To reduce risks to future occupants from the nearby mobile source (i.e., U.S. Highway 101), the air quality assessment recommended conditions of approval for air filtration devices and an ongoing maintenance plan for the building air filtration system, which are included as conditions of the Planned Development Permit, which would be implemented prior to the issuance of building permits. With these conditions, health risks to future occupants of the site would be reduced below Bay Area Air Quality Management District (BAAQMD) thresholds.

Another comment expressed concern about the exposure of future residents to traffic noise from U.S. Highway 101. As stated in Section 4.12.4.2, Appendix H of the IS/MND, and in the paragraph above, the exposure of future occupants of the site to existing noise sources is not required under CEQA following the California Supreme Court opinion in *CBIA vs. BAAQMD*. The IS/MND disclosed that there are potential risks from nearby sources (i.e., U.S. Highway 101) to future occupants of the project with regard to both indoor and outdoor

noise exposure. Regarding the exterior noise exposure at the outdoor use areas, the IS/MND and associated noise assessment (Appendix H to the IS/MND) disclosed that the largest common area, located southeast of Building B, would be acoustically shielded by a proposed 14-foot to 16-foot noise barrier (i.e., masonry sound wall), which based on the results of the noise analysis, would have a predicted noise level of 56 to 60 dBA DNL. Based on the General Plan policy EC-1.1, the 56 to 60 DNL is considered normally acceptable for outdoor common use areas.

Furthermore, the project would be required to implement noise attenuation measures to reduce interior noise levels. These measures include insulation (i.e. sound-rated windows and doors, sound-rated wall constructions, and acoustical caulking) to reduce interior noise levels to the City standard of 45 dBA DNL. Prior to issuance of building permits, an acoustic analysis specifically for interior noise, including the description of the necessary noise control measures, is required to be submitted to the City with the project building plans to ensure interior noise levels are reduced to 45 dBA DNL or lower. Compliance with California Building Code requirements for interior noise would ensure that occupants of the site are not exposed to excessive interior noise levels. This is a standard requirement for projects located near freeways and high-volume roadways and will be part of the Planned Development Permit of this project. (see pages 119 and 120 of the IS/MND)

Impacts to Agricultural/Grazing Land: Several community members also expressed concerns regarding the removal and reduction in agricultural resources and grazing land.

Response: Several comments expressed concern about the project's impact to agricultural resources. As stated in the IS/MND Section 4.2 and 4.8, the site was developed with orchards from 1938 until the mid-1950's and has since been used as grazing lands. However, according to the California Department of Conservation and the Santa Clara County Williamson Act Properties information map, the project site is not part of a Williamson Act nor is the site considered to be Prime Farmland, Unique Farmland, or Farmland of Statewide Importance. As stated in the IS/MND, the project site is designated as *Grazing Land* in the Santa Clara County Important Farmland. However, the project would only develop three acres of a larger 21-acre site, of which the three acres are currently developed with small structures. The remaining 18 acres would continue to be open space with no physical changes proposed. Therefore, development of the 3-acre project site would not result in the conversion of agricultural land to non-agricultural uses.

Geological and Landslides: Several comments also expressed concerns of potential landslide resulting from construction of the project.

Response: As disclosed in the IS/MND, the site is located within a Geologic Hazard Area in the City's *Geologic and Seismic Hazards Map*. Geotechnical and Geologic Hazard Evaluations were prepared, which analyzed potential landslide risks during construction and operation of the site (Appendix E-1 and E-2). These evaluations were reviewed and a

geohazard clearance was approved by the City Geologist as part of this project. A Certificate of Geologic Hazard Clearance was issued on April 15, 2016 for the site structures as shown on the plans. The project must adhere to the conditions and requirements set forth in the certificate. Additionally, a Certificate of Geologic Hazard Clearance was issued on May 8, 2018 for the sanitary sewer alignment shown on the plans, of which the sanitary sewer project must also adhere to the conditions and requirements set forth in the certificate. Based on the analysis as discussed in the IS/MND, particularly in Section 4.6 Geology and Soil, it was determined that the construction activities of the project could alter existing slope configurations and could expose people and structures to damage and/or safety hazards. However, implementation of the mitigation measure and standard condition of approval require the construction of a retaining wall, and grading of the slope behind Building B or installation of a retaining structure to prevent rockfall and soil creep and reduce potential risk. In addition, prior to issuance of grading and building permits, the PBCE Building Division will also review for structural safety. With these conditions and measures, the potential geological impacts (landslide included) would be less than significant under CEQA.

Naturally Occurring Asbestos and other Potential Hazardous Materials Impacts: Several comments also addressed naturally occurring asbestos and potential disturbance to those materials during construction. In addition, many comments also pointed out potential health effects if protocols are not followed during the construction.

Response: The IS/MND and the supporting Geotechnical Investigation (Appendix E-1 to the IS/MND) Soil Quality Evaluation (Appendix F-2 to the IS/MNND) disclosed that serpentine bedrock was encountered on the site at depths ranging from the ground surface to 14 feet below ground surface (bgs). Based on the evaluations and investigations, asbestos as chrysotile was detected in two of six soil samples at concentrations of 0.25 percent and 0.75 percent, respectively. The California Air Resources Board (CARB) and BAAQMD screening criteria is 0.25 percent. In the other four soil samples, chrysotile fibers were observed but not at levels that exceeded the 0.25 percent threshold. Due to the results of this sampling activity, mitigation measure MM HAZ-1.1 has been incorporated into the project to reduce the potential exposure during construction activities. This measure requires the preparation and approval of a site-specific Asbestos Dust Mitigation Plan (ADMP) to be reviewed by the appropriate oversight agency (BAAQMD) prior to the issuance of any grading permits. The ADMP shall include dust and erosion control measures to eliminate or minimize the generation of dust and erosion associated with excavation activities, truck and vehicle traffic onto and off the site, and the effects of ambient wind traversing exposed soil. The ADMP shall also include protocols for air monitoring of contaminants of concern documenting worker exposures and off-site migration of dust, if any, during soil disturbing activities.

Lighting: Several comments expressed concern about project lighting.

Response: The project would incorporate windows, but the project would not incorporate a large number of other materials that would be reflective or resulting in substantial glares to

the drivers on 101 or to nearby residents. In addition, landscaping is incorporated around the perimeter of the development area and uses of natural colored materials will minimize glare. The project would result in new lighting and the project would conform to the Outdoor Lighting on Private Development policy.

Traffic, vehicle access, roadway conditions: Several comments addressed existing traffic on hassler during peak hours and how the project would worsen the existing condition. Furthermore, the existing roadway on Dove Hill Road was a repeated concern throughout all the Ranch's residents.

Response: Per discussion in the IS/MND, traffic impacts for this project has been reviewed and considered to be consistent with the Evergreen East Hills Development Policy. Further discussion regarding traffic operations are available in the IS/MND, Transportation Operational Assessment (Appendix I to the IS/MND), and the supplemental memo to Council.

Biological Resources and Required New Environmental Impact Report (EIR): Furthermore, a comment letter was received on September 17, 2018 from HM Law Group LLP representing the residents of the Ranch that further restated concerns regarding compatibility of the project to the surrounding existing development, air quality, and biological resources. The letter also supplemented previous comments from another commenter (i.e., representative of Lozeau Drury LLP) to request for an Environmental Impact Report (EIR) to be completed as there is a fair argument that development of a convalescent hospital under the Project raises significant environmental issues..." Major issues highlighted in this letter pertains to conformance with goals and policies to protect serpentine grassland, and biological resources were reiterated.

Response: Refer to responses above for concerns related to aesthetics and air quality.

The project would develop only three acres of the 21-acre site, with the remaining 18 acres to remain open space. As part of the IS/MND and associated Biological Assessment (Appendix B), information concerning the known distribution of threatened, endangered, or other special-status species and sensitive habitat that may occur in this area was reviewed, including the Valley Habitat Plan (VHP), and was disclosed. As previously stated in the IS/MND, biological assessment, and multiple responses to comments (such as A3 above), reconnaissance-level field surveys were also conducted in September 12, 2008 and September 15, 2008. A follow up survey was conducted on February 9, 2009. Afterwards, a more focused reconnaissance-level site survey was completed for adult Bay Checkerspot butterflies in March 31, 2015. Based on the research found in the area and the reconnaissance site surveys, determinations regarding the potential number of individuals/pairs of certain species that may be impacted by the project, and relate that number to regional populations are made.

As stated in the IS/MND Section 4.4 and Biological Assessment (Appendix B to the IS/MND), the majority of the project site is designated Serpentine Bunchgrass Grassland within the Habitat Plan (land cover mapping was completed for this area using primarily

aerial photos rather than on-the-ground mapping). Site surveys also confirmed that a few very limited patches of native-dominated serpentine habitat occur at the edge of the project footprint. However, very little serpentine habitat (approximately 100 to 200 square feet or less) occurs within the project's development footprint, and because this serpentine habitat is located right at the edge of the developed and weedy portions of the site, it provides relatively low-quality habitat for serpentine-associated special-status plants. Nevertheless, potential project impacts to special-status plants are discussed within the reports itself.

The IS/MND and associated biological assessment have also identified numerous low-statured outcrops of serpentine rocks scattered within the 18-acre open space area. However, the majority of the approximately 18-acre open space area to the north, east, and south of the 3-acre developed area supports heavily grazed (disturbed) California annual grassland habitat and serpentine grassland. The grassland is grazed by livestock. The predominant plant species identified in grassland habitat are California poppy, miner's lettuce, and buckwheat. Non-native plants include black mustard, soft chess, and sand-spurry. Native plant species include tarweed, California poppy, and dwarf plantain. Most of the special-status plants known to occur in the project vicinity are associated with serpentine grasslands and outcrops within the 18-acre which is to remain as open space as part of this project.

The General Plan Policy ER-1.6 is part of the ER-1 goal to preserve and protect the ecological and scenic resources. It aims to protect serpentine grasslands and serpentine chaparral, particularly communities that would protect sensitive plant and animal species. However, based on the information disclosed in the IS/MND, biological resources, and subsequent responses to comments pertaining to biological resource concerns, the project would continue to develop on an existing disturbed area (approximately 3 acres) within a 21-acre site while preserving 18 acres of the site in its current state. The IS/MND also disclosed potential impacts of other species likely to occur within the development area during construction of the 3-acre site and mitigation measures were identified to reduce the impacts. These mitigation measures include pre-construction surveys, on-site monitoring, and maintenance plan.

Moreover, staff had provided three separate responses regarding the sufficiency of the biological analysis in the Responses to Comments (<http://www.sanjoseca.gov/index.aspx?NID=6068>), the memorandum to City Council on August 28, 2018 (<https://sanjose.legistar.com/LegislationDetail.aspx?ID=3601592&GUID=02E32318-E90A-4589-A69A-6035517FCDCD&Options=&Search=>), and an additional response to this memo to Council for September 25, 2018 hearing (refer to Comments A1 to A20 above).

Conclusion: Based on the analysis and conclusions in the IS/MND, and on the responses to comments shown above, the Dove Hill Road Medical Care Facility project will not have a significant effect on the environment in that the IS/MND identifies one or more potentially significant effects on the environment for which the project applicant, before public release of this

draft Mitigated Negative Declaration, has made or agrees to make, project revisions that clearly mitigate the effects to a less than significant level, as defined in CEQA Guidelines §15369.5. Furthermore, the comments raised by the community did not provide information indicating the project would result in new environmental impacts or impacts substantially greater in severity than disclosed in the IS/MND [CEQA Guidelines §15074(b)] and therefore, no further analysis is required.